

G8GTJONC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

raj\_trehan@nysd.uscourts.gov-----x

3 UNITED STATES OF AMERICA,

4 v.

16 CR 19 (PGG)

5 MAALIK ALIM JONES,

6 Defendant.

7 -----x

8 New York, N.Y.  
9 August 16, 2016  
10:30 a.m.

10 Before:

11 HON. PAUL G. GARDEPHE,

12 District Judge

13  
14 APPEARANCES

15 PREET BHARARA

United States Attorney for the  
Southern District of New York

16 ANDREW DeFILIPPIS

17 Assistant United States Attorney

18 SEAN MAHER

Attorney for Defendant

G8GTJONC

(In open court, case called)

MR. DeFILIPPIS: Andrew DeFilippis for the government.  
With me at counsel table is Special Agent Boese of the FBI.

DEPUTY CLERK: Defendant ready?

MR. MAHER: Sean Maher for Mr. Jones, who is present  
in court. Good morning, your Honor.

THE COURT: Good morning.

MR. MAHER: Your Honor, as an initial matter, I would  
like to request -- Mr. Jones is seated next to me and he is  
still handcuffed, and this is the first time in court that he's  
remained handcuffed. I ask that he could be uncuffed.

THE COURT: What's the marshal's position?

DEPUTY MARSHAL: For security purposes for this  
matter, since there's no jury, we prefer to keep him secured.

THE COURT: You prefer to keep him handcuffed?

DEPUTY MARSHAL: Right, for security reasons.

THE COURT: He will remain handcuffed.

In this case Mr. Jones is charged with conspiring to  
provide and providing material support and resources to a  
foreign terrorist organization, namely al-Shabaab. He's also  
charged with conspiring to receive and actually receiving  
military-type training from al-Shabaab, and he's charged with  
possession of a firearm during and in relation to a crime of  
violence.

We were last together on July 6. At that time the

G8GTJONC

1 U.S. Attorney informed me of their plans to file a Classified  
2 Information Procedures Act, Section 4 motion. I will be  
3 referring to that statute by its acronym, CIPA.

4 The government filed its motion ex parte and under  
5 seal on August 5th, 2016. That same day the government gave  
6 notice to the defense of its CIPA filing as well as a copy of  
7 the proposed order which would grant a protective order and  
8 make findings that the information at issue, if disclosed,  
9 could cause serious damage to national security, and, in any  
10 event, is not relevant or helpful to the defense within the  
11 meaning of United States V. Aref, A-R-E-F, 533 F.3d 72 (2d Cir.  
12 2008). The statute CIPA, Section 4, provides that "The court,  
13 upon a sufficient showing, may authorize the United States to  
14 delete specified items of classified information from documents  
15 to be made available to the defendant through discovery under  
16 the Federal Rules of Criminal Procedure, to substitute a  
17 summary of the information for such classified documents, or to  
18 substitute a statement admitting relevant facts that the  
19 classified information would tend to prove."

20 Section 4 of the statute also states that, "The court  
21 may permit the United States to make a request for such  
22 authorization in the form of a written statement to be  
23 inspected by the court alone." Citing CIPA, Section 4. See  
24 also Aref, 533 F.3d, 81. ("Both CIPA Section 4 and Rule  
25 16(d)(1) authorize ex parte submissions when the government is

G8GTJONC

1 seeking to withhold classified information from the defendant.  
2 An adversary hearing with defense knowledge would defeat the  
3 very purpose of the discovery rules.")

4 In evaluating a motion under Section 4 of CIPA,  
5 "First, the district court must determine whether the material  
6 in dispute is discoverable, and if so, whether the state's  
7 secrets privilege applies." Citing United States v. Aref, 533  
8 F.3d 72, 80 (2d Cir. 2008).

9 It applies if "One, there is a reasonable danger that  
10 compulsion of the evidence will expose matters which in the  
11 interest of national security should not be divulged, and two,  
12 the privilege is lodged by the head of the department which has  
13 control over the matter after personal consideration by that  
14 officer." Id., 80. "If the information is discoverable but  
15 the privilege applies, then the district court must determine  
16 whether the information is helpful or material to the defense,  
17 i.e., useful to counter the government's case or to bolster a  
18 defense." Id.

19 "In order to be helpful or material, the evidence need  
20 not rise to the level that would trigger the government's  
21 obligation under Brady v. Maryland, 373 U.S. 83 (1963) to  
22 disclose exculpatory information." Id.

23 On August 12, 2006, Mr. Maher filed a brief arguing  
24 that the government's request to proceed ex parte with respect  
25 to its Section 4 filing should be denied. Mr. Maher relies on

G8GTJONC

1 cases arising outside the context of CIPA, and he argues in his  
2 papers that ex parte proceedings are generally disfavored and  
3 that I am not well equipped to act as a surrogate for defense  
4 counsel. Citing Docket Number 26 at pages 5 through 10.

5 In the alternative, Mr. Maher proposes that the  
6 government should be compelled to disclose its legal arguments  
7 in support of its Section 4 motion and that he should be  
8 permitted to make an ex parte presentation to the Court  
9 regarding how the classified information at issue may be  
10 relevant and helpful to the defense. I should note that  
11 Mr. Maher's submission to me was itself filed ex parte.

12 With respect to the general issue of whether the U.S.  
13 Attorney's Office should be permitted to proceed ex parte in  
14 making its motion under Section 4 of CIPA, I find that that  
15 approach is in fact proper because the statute explicitly  
16 authorizes ex parte proceedings, and the Second Circuit has  
17 noted that a contrary rule would essentially defeat the purpose  
18 of the statute because an adversary proceeding would involve  
19 the disclosure of the precise information that the government  
20 argues the disclosure of which would damage national security.  
21 So I find that the ex parte approach is specifically authorized  
22 by both statute and by the Second Circuit.

23 There are a couple of subsidiary arguments made by  
24 defense counsel I want to address.

25 Mr. Maher pointed out that he has a security

G8GTJONC

1 clearance, and given that he has a security clearance he should  
2 be given access to the information that the government seeks to  
3 protect. And defense counsel's argument that the security  
4 clearance justifies in sort of an automatic fashion access to  
5 classified information is misguided. Of course, one could have  
6 a security clearance and not have a need to know the classified  
7 information in question. The mere possession of a security  
8 clearance doesn't mean that the disclosure of classified  
9 information is appropriate, it's only appropriate if the person  
10 seeking access has the need to know the information.

11 Here, the law has set a standard essentially for when  
12 there's a need to know on the part of the defense counsel, and  
13 the need to know is whether the information in question is  
14 helpful or material to the defense either to counter the  
15 government's case or to bolster a defense. And so the mere  
16 fact that someone has a security clearance doesn't mean that  
17 disclosure of classified information to that person is  
18 appropriate. The Court in this instance has to make a finding  
19 as to whether the information in question meets the standard  
20 that I have just stated.

21 With respect to the argument that the government  
22 should be required to disclose its legal arguments in support  
23 of its non-production, I don't find that that's appropriate  
24 here because it's obvious from what the government has stated  
25 publicly what the issues are. The government contends that the

G8GTJONC

1 information in question meets the standard, the classified  
2 information, that is, it is information the disclosure of which  
3 presents a serious danger of causing damage to national  
4 security, and they're arguing that it meets the standard set by  
5 CIPA and should be withheld because it doesn't constitute  
6 information that is helpful or material to the defense within  
7 the meaning of the case law that I cited. So I don't find that  
8 it's necessary for any additional disclosure of the  
9 government's legal position to be made on a non-ex parte basis.

10 With respect to the remaining issue about whether  
11 defense counsel should be permitted to make an ex parte  
12 presentation to the Court regarding how exactly it is that the  
13 disclosure of classified information might be helpful or  
14 material to the defense, I am willing to listen to presentation  
15 from defense counsel on an ex parte basis.

16 I, of course, have read Mr. Maher's ex parte  
17 submission, but to the extent that defense counsel believes a  
18 back and forth with the Court might be helpful in terms of  
19 fleshing out the arguments why disclosure of the classified  
20 information at issue would be helpful or material to defense, I  
21 am prepared to listen to that presentation on an ex parte  
22 basis.

23 There are some additional materials that I need before  
24 I can do that. The government has provided me summaries of the  
25 information in question, and I want the underlying reports

G8GTJONC

1 before making a determination as to whether a protective order  
2 is appropriate. So I will need those reports before I can go  
3 further.

4 How long will it take you to gather that information?

5 MR. DeFILIPPIS: Your Honor, I wouldn't want to  
6 estimate until we consult with the relevant parts of the  
7 government. So maybe we could put in a letter to the Court  
8 with an estimate in the next couple of days. I'm not quite  
9 sure how long, I know we have done it in other cases, but we'll  
10 get back to Court on that.

11 THE COURT: Okay. Mr. Maher, what is your schedule  
12 like over the next few weeks? Do you have any issues I should  
13 know about?

14 MR. MAHER: I have some dates where I would be  
15 unavailable, and I could let the Court know that I am going to  
16 be out of town next week, the 22nd through the 25th. The 29th  
17 and 31st, my days are pretty booked those two days, and the 6th  
18 through the 9th I will be teaching outside the city.

19 THE COURT: I guess we're looking at the week of the  
20 12th.

21 MR. MAHER: I have various court proceedings that  
22 week, but I'm sure I can work that out with whatever works for  
23 the Court.

24 DEPUTY CLERK: The 14th at 10:00 a.m. is available.

25 THE COURT: How is the 14th at 10:00 a.m. for the ex



G8GTJONC

1 parte presentation?

2 MR. MAHER: I have an appearance at 9:30 in the  
3 Eastern District that may take an hour.

4 THE COURT: How about later that day?

5 MR. MAHER: I have a sentencing before Judge Daniels  
6 at 1:00 p.m.

7 THE COURT: How about 3 o'clock on the 14th?

8 MR. MAHER: That should be fine. If there's any issue  
9 with regard to the sentencing, I will send it on to your Honor.

10 THE COURT: That's good. We'll conduct an ex-party  
11 hearing at September 14 at 3 o'clock, at which time Mr. Maher  
12 can make his arguments to me on an ex parte basis as to why the  
13 classified information at issue will be helpful or might be  
14 helpful or material to the defense.

15 Now that date is predicated on the notion that the  
16 government will be able to gather the underlying reports to me  
17 in such a fashion that I can review that material before  
18 September 14th. So the government will let me know if there's  
19 any problem with that.

20 MR. DeFILIPPIS: Yes, your Honor.

21 THE COURT: Does the government wish to exclude time  
22 between now and September 14?

23 MR. DeFILIPPIS: We do, your Honor. And I wanted to  
24 raise with the Court whether it would make sense to address any  
25 supression motions and set a schedule for that at this point.

G8GTJONC

1 THE COURT: What do you say to that, Mr. Maher?

2 MR. MAHER: At this point, your Honor, I think it  
3 would be more prudent to finish this discovery area because  
4 that could implicate what I file as far as a suppression motion  
5 and the substantive hearing.

6 THE COURT: What I'm going to do is put it down for a  
7 conference the following week, and we'll talk then about if  
8 there's going to be any suppression motions. And if I haven't  
9 already ruled on the classified information question, I will do  
10 it at that time.

11 MR. MAHER: Thank you.

12 DEPUTY CLERK: The 21st at 10:00 a.m. is available.

13 THE COURT: Is that convenient for everyone,  
14 September 21 at 10:00 a.m.?

15 MR. DeFILIPPIS: Yes, your Honor.

16 MR. MAHER: That's fine.

17 THE COURT: All right. Any objection, Mr. Maher, to  
18 my excluding time between now and September 21?

19 MR. MAHER: No objection.

20 THE COURT: I will exclude time between today and  
21 September 21st, 2016, under the Speedy Trial Act pursuant to  
22 Title 18, United States Code, Section 3161(h)(7)(A) to permit  
23 additional consideration on this issue of disclosure of  
24 classified information, as well as to listen to Mr. Maher's  
25 arguments about the same, and also for defense counsel to

G8GTJONC

1 consider whether there will be any other pretrial motions in  
2 this case. I do find that the ends of justice served by the  
3 granting of this continuance outweigh the best interests of the  
4 public and the defendant in a speedy trial.

5 Anything else we should talk about today?

6 MR. DeFILIPPIS: No, your Honor. I just note, as we  
7 noted in the response we filed, if it would be helpful to the  
8 Court for the government to provide a similar presentation  
9 about its evidence or theory of the case, we would be willing  
10 to do that.

11 THE COURT: Okay, I will keep that in mind, and if I  
12 do think it's necessary we'll obviously get touch.

13 Anything else, Mr. Maher?

14 MR. MAHER: No, thank you.

15 THE COURT: Thank you.

16 o0o